



BRB No. 16-0549

PAULA WALTON)	
)	
Claimant)	
)	
v.)	
)	
SSA CONTAINERS, INCORPORATED)	
)	
and)	
)	
HOMEPORT INSURANCE COMPANY)	DATE ISSUED: <u>May 30, 2017</u>
)	
Employer/Carrier-)	
Petitioners)	
)	
PORTS AMERICA)	
)	
and)	
)	
PORTS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting Summary Decision Dismissing All Claims by SSA and the Order Denying Summary Judgment of William Dorsey, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and David L. Doeling (Aleccia & Mitani), Long Beach, California for SSA Containers, Incorporated, and Homeport Insurance Company.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for Ports America and Ports Insurance Company.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

BOGGS, Administrative Appeals Judge:

SSA and its carrier, Homeport Insurance Company, (SSA) appeal the Order Granting Summary Decision Dismissing All Claims by SSA and the Order Denying Summary Judgment (2016-LHC-00953, 2016-LHC-00954) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured both knees and lower back while working as a lasher for SSA on February 18, 2011. She filed a claim for medical and disability benefits on June 9, 2011. SSA EX 1. Claimant returned to work on May 30, 2011, but experienced an acute flare-up of pain and swelling in her knees and went off work again. Claimant returned to work again on July 26, 2011, and worked a total of eight days between this date and October 2, 2011, on which date she worked for Ports America (Ports) as a basic ship clerk. SSA EX 3. Claimant left work due to unbearable knee pain. SSA EXs 3; 6 at 61-64. She subsequently filed a claim against Ports for cumulative trauma injuries to her back and both knees. SSA EX 7.

On August 1, 2013, the parties settled claimant's claims against SSA and Ports via a Section 8(i), 33 U.S.C. §908(i), settlement application, which was approved by Judge Dorsey on August 7, 2013. SSA and Ports agreed to pay claimant \$23,000 in exchange for a discharge of all liability for disability benefits relating to the February and October 2011 injuries. SSA EX 7. Ports agreed to be responsible for future medical treatment, for claimant's left knee only, related to the February and October 2011 work injuries, but reserved the right to dispute liability based on work activities subsequent to October 2, 2011. The parties did not resolve liability for past medical treatment, stating that, "SSA/Homeport and Ports deny liability for any and all past medical care and shall pay, adjust or litigate any [and] all claims for payment of same, and hold Claimant harmless with respect to same." *Id.* at 3. In so doing, the parties noted that claimant received "unauthorized and disputed medical care" from Drs. Nutig, Venuturupalli, Rajogopalan, and Loddengaard, at Beverly Hills Orthopedic Group, Palos Verdes Rehab Clinic, Complete PT, Cedars Sinai PT, Cedars Sinai Hospital, and Torrance Orthopaedic & Sports Medicine Group, and that this unauthorized treatment included a left total knee arthroplasty on January 12, 2012, by Dr. Rajogopalan. *Id.*

Prior to executing the settlement agreement, SSA and Ports signed an indemnity agreement on June 24, 2013. SSA EX 10. Ports agreed to defend, indemnify, and hold SSA harmless in relation to claimant's longshore claim for the February 18, 2011 injury, in exchange for SSA paying Ports \$10,000. *Id.* The indemnity agreement was not a

document submitted in support of the parties' settlement agreement. Order at 2 (May 24, 2016).

Several years later, claimant filed a state workers' compensation claim for back and knee injuries she sustained at SSA on February 18, 2011; for back, knees, left hip, and left foot injuries she sustained at Long Beach Container Terminals (LBCT) on February 23, 2014; and for back, knees, left hip, and left foot injuries she sustained at SSA on March 6, 2014. *See* Ports EX 2. On February 19, 2015, the Motion Picture Industry Health Plan (MPIHP), claimant's private health care provider, filed a lien before the California Workers' Compensation Appeals Board (CWCAB) for \$81,450.79 for medical benefits it paid for claimant commencing on February 18, 2011. Ports EX 3. This sum included specific services for past medical treatment which SSA and Ports disputed and left unresolved in the Section 8(i) settlement agreement. SSA EXs 7, 9. The parties settled claimant's state claims on March 3, 2015. SSA agreed to pay \$500 towards attorney's fees, and LBCT agreed to pay claimant \$16,000. The parties did not resolve the liens for medical services rendered.¹ Ports EX 2.

On October 8, 2015, SSA "officially tendered the defense of the lien" to Ports in the state proceeding, citing their June 24, 2013 indemnity agreement. Ports EXs 1, 4-6. On November 9, 2015, Ports rejected the tender of defense, asserting that the indemnity agreement applies only to claims under the Longshore Act. Ports EX 7. On November 7, 2015, SSA requested an "emergency informal conference" with the district director to "seek enforcement of the indemnity agreement" and to address the issue of reimbursement for past medical benefits paid for by MPIHP. Ports EX 8. Ports opposed the informal conference, stating there are remedies under the state workers' compensation law. Ports EX 9. MPIHP objected to the informal conference, stating that it opposed having its lien adjudicated in the federal forum and that the CWCAB has jurisdiction over its lien claim. Ports EX 12. An informal conference was held on January 5, 2016. Ports EX 10. In the Memorandum of Informal Conference, the claims examiner concluded that the Office of Workers' Compensation Programs does not have jurisdiction to enforce an indemnity agreement, and, "in the spirit of compromise," recommended that the parties pay for medical benefits according to their respective dates of injury. *Id.* Thus, it was recommended that SSA be held liable for medical benefits for the period of February 18 through October 1, 2011, and that Ports, as the last responsible employer, be liable for medical benefits from October 2, 2011. *Id.* On March 11, 2016, SSA requested the case

¹ Dr. Bal Rajogopalan also filed a lien, which is not at issue in this appeal.

be referred to the Office of Administrative Law Judges (OALJ), and on March 31, 2016, it filed a pre-hearing statement.² Ports EX 13; Pre-Hearing Statement.

While the case was pending before the administrative law judge, SSA filed a Motion for Summary Decision, moving the administrative law judge to order Ports, as the last employer, to reimburse the MPIHP for the back and knee treatment it provided between October 2, 2011 and December 12, 2013.³ SSA argued that the administrative law judge has authority to order reimbursement on two separate grounds under the Act: 1) under 33 U.S.C. §907(d)(3);⁴ and/or 2) pursuant to the parties' Section 8(i) settlement agreement.⁵ Ports responded to SSA's motion, urging the administrative law judge to deny it because SSA is not a "party in interest" under Section 7(d)(3) and MPIHP has not

² Meanwhile, on March 3, 2016, SSA moved to join Ports to the state lien claim and to stay the state proceedings pending the proceedings before the OALJ. MPIHP and Ports, separately, filed responses objecting to the stay of the hearing scheduled for April 5, 2016. On May 18, 2016, Judge Morgan of the CWCAB found that claimant sustained an injury on February 18, 2011, and that any opinion of subsequent cumulative trauma does not negate that fact. SSA Mot. for Recon. EX 1. On May 19, 2016, MPIHP sent a letter to SSA and Ports, stating that it is clear they are both liable for some of its lien and asking them to resolve their differences. Ports Resp. Mot. for Recon. EX 2.

³ MPIHP paid \$81,450.79 for knee, neck, and back treatment between February 18, 2011 and December 12, 2013. This total includes one bill for neck treatment rendered on November 16, 2013, totaling \$35.92. SSA did not seek reimbursement against Ports for this charge or for any of the knee and back treatment charges between February 18 and October 1, 2011, which total \$2,211.83. Rather, SSA asked the administrative law judge to order Ports reimburse MPIHP \$79,203.04 for knee and back treatment rendered after the October 2, 2011 injury at Ports.

⁴ SSA argued that it has standing as "a party in interest," under Section 7(d)(3), to seek an award for the "reasonable value" of the medical treatment MPIHP furnished for the October 2, 2011 back and cumulative trauma knee injuries. SSA argued in the alternative that MPIHP filed a valid claim for reimbursement under the LHWCA by virtue of its pursuing reimbursement in state court.

⁵ SSA argued that liability for past medical treatment remained open in the Section 8(i) settlement agreement, specifically stating that it now wished to litigate and resolve this issue and that "the evidence in this case overwhelmingly shows that Ports is liable to the MPIHP for the [post October 2, 2011 knee and back] medical treatment the MPIHP paid for." Mot. for Summ. Dec. at 7.

filed a claim for reimbursement under the Act.⁶ Ports further argued that a material dispute exists as to which employer is liable for the treatment that MPIHP covered, and, given that the state case has proceeded to a hearing, any issues under the Act should be stayed.

In a May 24, 2016 Order, the administrative law judge ordered SSA to show cause why summary decision should not be awarded in favor of Ports. The administrative law judge stated that no claim for medical reimbursement had been filed by MPIHP under Section 7(d)(3), the Section 8(i) settlement disposed of claimant's interest in this case, and enforcement of an indemnity agreement between employers is not a "question in respect of the Longshore claim." Order at 2. SSA responded that it was not seeking enforcement of the indemnity agreement and that the parties' settlement agreement specifically reserved the right to litigate liability for past medical benefits. Thus, SSA contended the administrative law judge has jurisdiction to address the claim for reimbursement. By Order dated June 9, 2016, the administrative law judge denied SSA's motion for summary decision and dismissed its claim, reiterating his prior rationale for finding he lacks jurisdiction to address the claim presented.

SSA appeals, challenging the administrative law judge's dismissal of its claim. It again asserts that it was not seeking enforcement of the indemnity agreement and that Section 7(d)(3) and/or the parties' Section 8(i) settlement agreement allows the administrative law judge to assign liability to Ports for the medical benefits that MPIHP covered. Ports responds, urging affirmance of the dismissal of SSA's claim. SSA filed a reply brief.

As an initial matter, we note that the administrative law judge correctly concluded that he lacks jurisdiction to enforce the indemnity agreement between SSA and Ports, as this contract is not "in respect of [a] claim" under the Act. 33 U.S.C. §919(a); *Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

We also reject SSA's argument that the administrative law judge may order reimbursement to MPIHP where it has not intervened in this case. Section 7(d)(3) states:

The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

⁶ Ports asserted that the dispute in this case is related to the indemnity agreement over which the administrative law judge has no jurisdiction.

33 U.S.C. §907(d)(3). This provision has been interpreted to grant standing to medical providers and third-party insurers to seek recovery of an injured claimant's medical benefits. *Hunt v. Director, OWCP*, 999 F.2d 419, 423-424, 27 BRBS 84, 91(CRT) (9th Cir. 1993); *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015); *see also Ozone v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986) (if claimant does not comply with Section 7, the intervening insurance carrier cannot recover). SSA does not allege that it has covered the cost of any of the treatment that it now seeks to have reimbursed to MPIHP. Moreover, because claimant was held harmless in the Section 8(i) settlement as to payment for medical benefits, MPIHP must assert its own rights under Section 7(d)(3). *See Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254, *modified on recon.*, 19 BRBS 52 (1986) (a claimant has no standing to pursue a third-party insurer's right to reimbursement for covered medical expenses; and, a third-party insurer seeking to recover covered medical expenses must be allowed to intervene). Thus, the administrative law judge did not err in finding he lacks jurisdiction pursuant to Section 7(d)(3) to address a reimbursement claim.

However, we agree with SSA that it raised a justiciable dispute to the extent that it raised the issue of which employer is the "responsible employer" in this case as it relates to liability for medical benefits. It is well established that an administrative law judge has "full power and authority to hear and determine all questions in respect of" a claim for compensation under the Act. 33 U.S.C. §919(a); *see Crowell v. Benson*, 285 U.S. 22, 62 (1932). Questions "in respect of" a claim are those that are "essential to resolving the rights and liabilities of the claimant, the employer, and the insurer" under the Act. *Ricks*, 261 F.3d at 463, 35 BRBS at 97(CRT). By asking the administrative law judge to resolve which employer is liable for past medical benefits for injuries covered by the Act, SSA raised an issue "in respect of" a claim that the administrative law judge is empowered to resolve. *Id.*; *see also Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997) (holding it was error to dismiss case as involving solely indemnity contract dispute; such dispute was ancillary to responsible employer issue that the administrative law judge is empowered to resolve). Moreover, the parties' Section 8(i) settlement agreement specifically preserved the right to litigate the issue of liability for the past medical benefits now at issue. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 73 (2005) (holding that settlement agreement resolving claimant's interests in claim does not divest administrative law judge of authority to address dispute regarding "who under the LHWCA, is responsible for paying" the claimant's benefits); SSA EXs 7 at 3; 9. As this issue was preserved and is "in respect of" a claim under the Act, the administrative law judge has jurisdiction to resolve it.⁷ We therefore reverse the administrative law judge's

⁷ We note that the settlement identified specific services as provided to claimant which remained at issue. SSA EXs 7 at 3; 9.

finding that he lacks jurisdiction to resolve the responsible employer dispute, vacate the denial of SSA's motion for summary decision and dismissal of its claim, and remand the case for further consideration. On remand, the administrative law judge must address the merits of SSA's motion for summary decision, *i.e.*, whether SSA demonstrated the absence of a genuine issue of material fact and that it is entitled to a decision in its favor as a matter of law as to which employer is liable for the past medical benefits at issue.⁸ See generally *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in part. part on recon.*, 46 BRBS 57 (2012); *Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003).

Accordingly, the administrative law judge's Order Granting Summary Decision Dismissing All Claims by SSA and the Order Denying Summary Judgment are vacated and the case is remanded for further consideration consistent with our decision.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to remand this case for the administrative law judge to address which employer is liable for reimbursement of medical benefits to the Motion Picture Industry Health Plan (MPIHP). Although I agree that the administrative law judge, in general, has jurisdiction over issues concerning the

⁸ As discussed, on the facts of this case, this authority does not extend to ordering reimbursement to MPIHP. Moreover, on remand, the administrative law judge may assess whether he should stay the proceedings under the Act until completion of the state claim if he believes the state adjudication will be determinative, as Ports asserted in its response to SSA's motion for summary decision.

employer responsible for medical benefits under the Act notwithstanding the settlement of claimant's claim, *see generally Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 73 (2005), I would affirm the administrative law judge's finding that, at present, there is no issue before him that is "in respect of" a claim under the Act. 33 U.S.C. §919(a). The "claim" in this case arises out of a lien that MPIHP filed in state court, over which the administrative law judge has no jurisdiction. Indeed, MPIHP has explicitly stated that it wishes to pursue reimbursement for benefits paid on claimant's behalf in the state forum rather than the federal forum. Ports EX 12. Moreover, the administrative law judge accurately observed that the parties settled claimant's interest in her claim and that no claim for reimbursement has been filed under Section 7(d)(3), 33 U.S.C. §907(d)(3). Absent any claim for benefits under the Act, the issue of which employer is responsible for medical benefits is a theoretical one, unripe for adjudication. *See generally Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994). In addition, the administrative law judge properly stated that he does not have jurisdiction to address the employers' indemnity agreement. *Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

Therefore, although the parties' settlement agreement preserved the right to litigate which employer may be liable for medical benefits, inasmuch as no claim for reimbursement has been filed under Section 7(d)(3), I would affirm the administrative law judge's finding that no claim under the Act has been presented for adjudication. *See generally Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom Bailey v. Hymel*, 104 F. App'x 415 (5th Cir. 2004). Accordingly, I would affirm the denial of SSA's motion for summary decision and dismissal of the case for lack of jurisdiction.

GREG J. BUZZARD
Administrative Appeals Judge